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Part IV

Environmental Protection Agency

40 CFR Part 280

Underground Storage Tanks Containing
Petroleum; Financial Responsibility
Requirements; Rule

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 280**

[FRL-4842-6]

Underground Storage Tanks Containing Petroleum; Financial Responsibility Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today promulgating a rule to amend the financial responsibility requirements for underground storage tanks (USTs) containing petroleum that appear in subpart H of 40 CFR part 280. Specifically, this rule modifies the financial responsibility compliance date under 40 CFR 280.91(e) for one category of UST owners. Under this modification, Federally-recognized Indian tribes that own USTs on Indian lands are required to comply with Federal Financial Responsibility requirements of 40 CFR part 280 subpart H—Financial Responsibility—by December 31, 1998 if those USTs are in compliance with applicable technical requirements for USTs in 40 CFR part 280. Today's rule extends the deadline for certain USTs owned by Indian tribes from the previous date of February 18, 1994. This change will allow EPA, the Bureau of Indian Affairs and Indian tribes additional time to explore options for solving the root problem of lack of funding for past contamination on Indian lands and further assist tribes with future technical requirements, such as tank upgrading. EPA is not changing the financial responsibility deadline for rural petroleum marketers or local governments. A discussion of the Agency rationale behind this decision can be found in section III. C. under "SUPPLEMENTARY INFORMATION".

EFFECTIVE DATE: This rulemaking is effective on February 28, 1994.

ADDRESSES: The public docket for this rule is in room M2616, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Call (202) 260-9720 for an appointment to review docket materials.

FOR FURTHER INFORMATION CONTACT: The RCRA/Superfund Hotline at (800) 424-9346 (toll free) or (703) 412-9810 in Virginia. For technical questions, contact Sammy Ng in the Office of Underground Storage Tanks at (703) 308-8882.

SUPPLEMENTARY INFORMATION: EPA is today finalizing a rule that would allow

certain Federally-recognized Indian tribes that own USTs containing petroleum on Indian lands additional time to comply with the financial responsibility requirements. Specifically, this rule modifies the compliance date under 40 CFR 280.91(e). Under this modification, Indian tribes that own USTs containing petroleum on Indian lands must comply with the financial responsibility requirements by December 31, 1998. To qualify for the 1998 financial responsibility deadline, tribally-owned USTs must be in compliance with the technical requirements for USTs described in 40 CFR part 280. Technical compliance for USTs includes, for example, leak detection and reporting. The technical requirements criterion has been included to protect human health and the environment on Indian lands. EPA is not changing the financial responsibility deadline for rural petroleum marketers or local governments. A discussion of Agency rationale behind this decision can be found in section III. C.

The contents of today's preamble are listed in the following outline:

- I. Authority
- II. Effective Date
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- IV. Final Rule
 - A. Indian Tribes
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 - C. Discussion of Options Proposed but Not Finalized for Petroleum Marketers and Local Governments.
- V. Economic Impacts
 - A. Economic Impact Analysis
 - B. Regulatory Flexibility Analysis
 - C. Regulatory Impact Analysis
 - D. Paperwork Reduction Act

I. Authority

These regulations are issued under the authority of sections 2002, 9001, 9002, 9003, 9004, 9005, 9006, 9007, and 9009 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6912, 6991, 6991a, 6991b, 6991c, 6991d, 6991e, 6991f, and 6991h).

II. Effective Date

This rule will be effective on February 28, 1994, pursuant to 5 U.S.C. 553(d). This rule may be made effective immediately because it extends an existing compliance date and there is good cause to make that extension immediately effective within the meaning of 28 U.S.C. 553(d)(1) and (3).

III. Background

On October 26, 1988, EPA promulgated financial responsibility requirements applicable to owners and operators of underground storage tanks (USTs) containing petroleum (53 FR

43322). To meet the requirements, owners and operators must demonstrate that they can pay for the costs of cleanups and third-party damages resulting from any leaks that may occur. In the final rule, EPA established a phased compliance schedule for owners and operators of petroleum USTs. The principal reason for adopting the phased compliance approach was to provide the time necessary for providers of financial assurance mechanisms (including private insurance companies and states intending to establish state assurance funds) to develop new policies and programs or conform their policies and programs with EPA requirements. See 53 FR 43324.

When devising the phased compliance approach, the Agency wanted to achieve the best balance between the need to demonstrate financial responsibility for UST releases and the time necessary for owners and operators to obtain assurance mechanisms. The Agency attempted to establish compliance dates that were as early as possible, considering the type of assurance different types of facilities were likely to obtain. Petroleum marketers owning or operating 1,000 or more USTs and non-marketers with more than \$20 million in tangible net worth were required to comply by January 24, 1989, based primarily on their ability to qualify for self-insurance. Petroleum marketers with 100 to 999 USTs were required to comply by October 26, 1989. These marketers were estimated to be relatively more likely to be able to obtain insurance; some of them were also expected to qualify as self-insurers. Petroleum marketers owning 13 to 99 USTs at more than one facility were originally required to comply by April 26, 1990. However, on May 2, 1990, the Agency published a rule (55 FR 18566) extending this compliance date to April 26, 1991. These marketers were thought to be less likely to be able to obtain insurance than members of the October 26, 1989, compliance group.

Petroleum marketers owning fewer than 13 USTs at more than one facility or owning only one facility with fewer than 100 USTs, as well as non-marketers with less than \$20 million in net worth and local governments (including Indian tribes) were originally required to comply by October 26, 1990. This group was expected to rely primarily on state assurance funds for compliance. (State assurance funds provide money for cleanups to owners and operators in their states. Owners and operators in states with assurance funds are deemed to be in compliance with financial responsibility for the amount covered by

the fund once the state submits the fund to EPA for approval unless and until EPA disapproves the fund.) On October 31, 1990, EPA extended the compliance deadline for one year for small marketers (with fewer than 13 USTs or fewer than 100 USTs at a single facility) and small non-marketers (with less than \$20 million in net worth), otherwise known as Category IV. This extension was based on the need for additional time for state assurance funds to be developed. In addition, EPA extended the compliance deadline for local governments and Indian tribes until one year after publication of a final rule with additional self-insurance mechanisms for local governments to use to demonstrate compliance. This rule was published on February 18, 1993 (58 FR 9026).

On December 23, 1991, EPA once again extended the compliance deadline for the Category IV group (small marketers with fewer than 13 tanks at more than one facility or fewer than 100 tanks at a single facility as well as non-marketers with net worth less than \$20 million) to December 31, 1993 (56 FR 66369). EPA based the extension on its understanding that more members of this compliance group than the Agency had originally projected must rely on state assurance funds, rather than on insurance, to demonstrate compliance with the financial responsibility requirements. EPA believed that, in order for owners and operators to rely on state assurance funds as compliance mechanisms, states must have more time to submit their state assurance funds to EPA for approval. Currently, 31 state assurance funds have been approved by EPA and an additional eight state assurance funds have been submitted to EPA for approval. (It is important to note that upon submission of a state assurance fund to the EPA Regional Administrator, the fund is considered to be approved unless and until EPA disapproves it.) Additionally, the extension provided states with more time to develop and implement financial assistance programs (e.g., direct loan programs, loan guarantee programs, grant programs) which help owners and operators (especially small businesses) pay for technical requirements such as tank upgrading. These technical improvements, in turn, help USTs meet insurers' underwriting criteria.

The Agency, however, continued to be concerned about the effects of its regulations on the regulated community. By analyzing the costs of the requirements, EPA found that the affordability of financial responsibility compliance is often tied to early

compliance with technical requirements such as tank upgrading, since, for example, private insurance companies may refuse to provide coverage unless they are certain that a site does not pose a high risk of leaking. EPA believed that the costs associated with the technical requirements are an important factor underlying the inability of some small owners and operators to meet the financial responsibility requirements. These costs coupled with the lack of a state assurance fund, grant, or loan program could force some gas stations to close their tanks when the 1993 financial responsibility compliance date fell. EPA believed that tank closure could be particularly problematic when those tanks provide essential services to rural communities.

As a result of this concern about the availability of fuel in rural areas, EPA proposed a December 31, 1998 compliance date for certain petroleum marketers, local governments, and Indian tribes, that meet Federally-determined criteria (58 FR 43770). The objective of the August 17, 1993 proposed rule was to obtain data on whether an additional extension of the financial responsibility requirements was needed, and for whom. The Agency intended to limit any additional extension to, at most, a small sub-group of marketers currently in Category IV, as well as certain local governments and Indian tribes; EPA did not want to change compliance dates for all Category IV marketers or local governments on the belief that most of these tank owners were already in compliance with the financial responsibility requirements due to the existence of state assurance funds and reliance on self-insurance mechanisms. The August 17, 1993 proposed rule included eligibility criteria limiting the proposed 1998 compliance group to rural petroleum marketers that met a hardship criterion of annual profit on gasoline sales of \$15,000 or less, rural local governments that use tanks for essential services such as police and fire departments, and Indian tribes. (The definition of rural was obtained from the Farmers Home Administration within the U.S. Department of Agriculture.) In addition, all owners in the new 1998 compliance group would have to ensure that their tanks were in compliance with applicable technical requirements, such as leak detection. The technical compliance criterion was included to protect human health and the environment regardless of a change in the financial responsibility deadline. EPA also stressed the fact that any change in the financial responsibility

compliance date would not remove the liability on the part of the owner or operator to clean-up a leak.

Current Financial Responsibility Deadlines

January 24, 1989:

Marketers With 1000 or More Tanks;
Non-Marketers With Net Worth
Greater Than \$20 Million.

October 26, 1989:

Marketers With 100-999 Tanks.

April 26, 1991:

Marketers With 13-99 Tanks at More
Than One Facility

December 31, 1993:

Marketers With 1-12 Tanks at More
Than One Facility or Fewer Than
100 Tanks at One Site; Non-
Marketers With Net Worth Less
Than \$20 Million.

February 18, 1994:

Local Governments and Indian Tribes

IV. Final Rule

EPA received 58 comments on the August 18, 1993 proposed extension. 34 commenters supported an extension for one or more groups. 21 commenters opposed any extension of the financial responsibility requirements. No commenters objected to an extended compliance deadline for Indian tribes while one commenter supported it. One commenter remained neutral on the subject and two additional comments were received regarding the proposed definition of rural, as defined by the Farmers Home Administration.

Based on EPA analysis of the comments received as well as the rest of the administrative record from the proposal, the Agency is finalizing an extension to 1998 for Federally-recognized Indian tribes that own USTs on Indian lands. No other entity (petroleum marketer or local government) has been included in this 1998 compliance group. A discussion of comments relating to a 1998 compliance deadline for petroleum marketers and local governments can be found in section III C.

A. Indian Tribes

Based on an analysis of the administrative record for this rulemaking and lack of opposition to an extension for tribes, EPA is extending the compliance deadline for Tribally-owned USTs on Indian lands to December 31, 1998 if the USTs meet the technical compliance criterion. The Agency is sensitive to the lack of funding available to help Indian tribes pay for environmental problems and acknowledges that mechanisms used by other owners, such as state assurance funds or private insurance, may be

inaccessible to tribes. The Agency has retained the technical compliance criterion in order to protect human health and the environment on Indian lands and expects that inclusion of this criterion may prompt some owners to come into compliance with the technical requirements in order to qualify for the extension. (Tanks owned by Indian tribes which are out of compliance with applicable technical requirements would not be eligible for the 1998 deadline.)

The additional time will also allow the Agency to work with the Bureau of Indian Affairs (BIA) at the U.S. Department of the Interior to explore options for solving the root problem of lack of funding for past contamination on Indian lands and further assist tribes with future technical requirements, such as tank upgrading.

A compliance date of December 31, 1998 was selected for Indian tribes because this date corresponds with the final technical compliance date for tank upgrading. Tribes unable to comply with the financial responsibility requirements at that time face the more costly technical requirement of upgrading their USTs. At that point, tanks not in technical compliance would be forced to close with or without the financial assurance coverage. Conversely, owners able to meet the technical requirements at that time would be more likely to obtain an affordable assurance mechanism, such as private insurance, since the tanks would be considered an insurable, reasonable risk.

B. Implementation of Final Rule

EPA intends to promulgate regulation's that pose the least burden to the affected regulated community while protecting human health and the environment. Therefore, no change in reporting requirements or recordkeeping procedures from the October 26, 1988 rule is incorporated into this rule.

The August 17, 1993 proposed rule included a requirement that UST owners self-certify for an extension and keep a record of the proposed compliance checklist on file for enforcement purposes. Based on a review of the comments and the rest of the administrative record for the proposal, the Agency has decided that this self-certification is unnecessary for implementing this rule and has therefore decided to delete the self-certification and recordkeeping requirement.

C. Discussion of Options Proposed But Not Finalized for Petroleum Marketers and Local Governments

As noted above, EPA received 58 comments on the August, 1993 proposed rule. Of the 34 comments received in support of a 1998 compliance deadline, 17 specifically supported an extension only for petroleum marketers. An additional seven comments were received in support of local governments, four for non-marketers (such as rental car companies, etc.), and one for Indian tribes. Five commenters supported an extension for *all* Category IV firms and local governments regardless of criteria, or not at all, concluding that a limited extension would be unfair to the entities not included in the 1998 compliance group.

Twenty-one commenters were against any additional extension to 1998. Of the 21 comments which disagreed with the proposed extension, eight were provided by state agencies that administer UST regulatory or state fund programs. One commenter was neutral, neither agreeing or disagreeing with the proposed compliance date, and two additional comments addressed only the definition of rural.

Commenters arguing for a 1998 compliance date for certain petroleum marketers and local governments stated that the additional time was needed to keep small businesses open. Several commenters said that compliance with financial responsibility was difficult in states without state assurance funds. In fact, of the commenters supporting a 1998 compliance date for one or more groups, 12 out of 35 were received from a state without a state assurance fund. In addition, some commenters said that insurance was not affordable, particularly when tanks have not been upgraded. Two commenters urged an extended compliance date in two states that plan to adopt a state assurance fund or loan program. One of those commenters felt that a 1996 compliance date would be acceptable since it would correspond to the date the state loan program plans to be operational. Another commenter noted that not all local governments can pass one of the four additional self-insurance mechanisms promulgated in February, 1993, and one additional commenter urged EPA to extend the financial responsibility compliance date for hospitals that use their tanks to fuel emergency generators.

Several commenters arguing against an additional extension to 1998 for local governments and petroleum marketers stated that most of these owners were

already in compliance due to state assurance funds. Several commenters also stated that an extension would not be fair to those owners already in compliance with the financial responsibility requirements. Others felt an extended compliance group to 1998 would incorrectly imply that the remaining technical compliance dates would be extended by EPA as well. Other commenters noted that the criteria included in the proposed rule were difficult to implement and would prove burdensome to states with regard to enforcement since different petroleum marketers and local governments would have different compliance dates. Other commenters feared that adoption of a 1998 deadline for certain gas stations and local governments would hurt the environment, since the requirement was necessary to ensure that money would be available to pay for cleanups. One commenter stated that previous compliance date extensions reduced the volume of business available to private insurers trying to create a market for UST insurance, thereby increasing the price. Another commenter echoed that sentiment, saying that previous extensions had stopped private mechanisms, such as insurance, from developing fully. Finally, several commenters state that it was appropriate to exclude non-marketers from any additional extension since sales of petroleum were not crucial to their operations.

Based on a review of the comments and the administrative record, EPA has decided *not* to extend the financial responsibility compliance deadline for petroleum marketers, non-marketers, or local governments. While the Agency acknowledges that some of these owners, especially in those few states without a state assurance fund, may have difficulty complying with the financial responsibility requirements, EPA agrees with commenters that say that most owners and operators are already covered by either state assurance funds, self-insurance mechanisms or private insurance. Agency analysis indicates that compliance may be as high as 98% for local governments with the addition of the four self-assurance mechanisms promulgated in February, 1993. In addition, just 14% of all tanks are in states without legislation creating state assurance funds. The Agency also agrees that another extension hurts EPA credibility with regard to upcoming technical compliance dates and agrees that a later compliance date is unfair to owners and operators already in

compliance. In addition, a 1998 compliance deadline for some local governments and petroleum marketers would create an administrative burden for states to implement, since some states would need to change their legislation or regulations in order to adopt the new deadline. EPA also acknowledges the difficulty in trying to define an appropriate subgroup and believes that inclusion of certain marketers and local governments in a new compliance group would create additional confusion in the regulated community.

EPA agrees with commenters who feared that adoption of a 1998 deadline for certain gas stations and local governments might hurt the environment in the event that funds are not available to undertake corrective action. In adopting the phased compliance approach, the Agency wanted to achieve the best balance between the need to demonstrate financial responsibility for UST releases and the ability of different types of tank owners to obtain the assurance mechanisms. In deciding not to extend the compliance deadline for petroleum marketers and local governments, the Agency has decided that, since most marketers and local governments can comply, the balance has to be weighed in favor of demonstrating compliance. On the other hand, the current inability of Indian tribes to demonstrate compliance as explained in section IV.A above led the Agency to reach the opposite decision in that situation.

EPA also received comments with regard to the criteria discussed in the proposed rule applicable to petroleum marketers and local governments. Most commenters supported the use of the Farmers Home Administration definition of rural, but felt that a hardship determination based on profit should be replaced with a measure of yearly throughput of gasoline through an UST system.

V. Economic Impacts

This section provides an estimate of the economic impacts of the proposed rule. Because the proposed rule will not cause an annual impact on the economy of \$100 million or more and will not cause an increase in the costs of production or the prices charged by the affected community, a Regulatory Impact Analysis is not required. Instead, EPA has prepared an economic impact

analysis to estimate the number of affected facilities that would benefit from this additional flexibility.

A. Economic Impact Analysis

The economic analysis examines the potential economic effects of adopting a new compliance category to 1998 and estimates the number of potentially affected entities.

Overall, approximately 1.3 million USTs are subject to the technical and financial responsibility standards. The number of tribally-owned USTs that could be eligible for the 1998 compliance date numbers approximately 500. These 500 tribally-owned USTs represent approximately 10% of all active tanks on Indian lands. (The remainder of the tanks on Indian lands are owned by private individuals and firms, as opposed to Federally-recognized tribes.) The total number of tanks eligible for the 1998 compliance date would be reduced, however, with the inclusion of the technical compliance criterion.

B. Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, when an Agency publishes a notice of rulemaking, for a rule that will have a significant effect on a substantial number of small entities, the agency must prepare and make available for public comment a regulatory flexibility analysis that considers the effect of the rule on small entities (i.e.: Small businesses, small organizations, and small governmental jurisdictions). EPA believes that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The new compliance deadline to 1998 will provide relief to members of this compliance group by allowing them additional time to comply with the financial responsibility requirements. Accordingly, the Agency has concluded that the law does not require a Regulatory Flexibility Analysis, and certifies that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

C. Regulatory Impact Analysis

1. Executive Order 12866

Pursuant to the terms of Executive Order 12866, OMB has notified EPA

that it considers this a "significant regulatory action" within the meaning of the Executive Order. EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

D. Paperwork Reduction Act

This rule does not contain any new information collection requirements subject to review by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Part 280

Environmental protection, Administrative practice and procedure, Hazardous materials insurance, Oil pollution, Penalties, Petroleum, Reporting and recordkeeping requirements, State program approval, Surety bonds, Underground storage tanks, Water pollution control.

Dated: February 18, 1994.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, part 280 of title 40 of the Code of Federal Regulations is amended as follows:

PART 280—TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS (UST)

1. The authority citation for part 280 continues to read as follows:

Authority: 42 U.S.C. 6912, 6991, 6991a, 6991b, 6991c, 6991d, 6991e, 6991f, and 6991h.

2. Section 280.91 is amended by revising paragraph (e) and adding paragraph (f), to read as follows:

§ 280.91 Compliance dates.

* * * * *

(e) All local government entities (including Indian tribes) not included in paragraph (f) of this section; February 18, 1994.

(f) Indian tribes that own USTs on Indian lands which meet the applicable technical requirements of this part; December 31, 1998.

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